AMERICAN ARBITRATION ASSOCIATION

Case No. 14 390 00841 12
Ralph H. Colflesh, Jr., Esq.
Arbitrator

CITY OF PHILADELPHIA
and
FRATERNAL ORDER OF POLICE
MICHAEL LUTZ LODGE 5
(Officer Robert McCollum 17-Day Suspension)

Appearances
For the City:
Nicole Morris, *Esq.*
City Law Department
Philadelphia, Pennsylvania
For the FOP:
Marc L. Gelman, Esq.
Jennings Sigmond, P. C.
Philadelphia, Pennsylvania

DECISION AND AWARD

Pursuant to the terms of a Collective Bargaining Agreement (JX 1)[1] by and between the parties hereto, the City of Philadelphia ("the City") and Fraternal Order of Police Michael Lutz Lodge 5 ("the FOP"), and the Labor Arbitration Rules of the American Arbitration Association ("the AAA"), the undersigned arbitrator was appointed to hear and determine the dispute described below. Upon due notice arbitration hearings were convened at 10:00 a.m. February 21, 2013 and March 7, 2013 in the AAA's offices, in Philadelphia, Pennsylvania. At those times both parties had an opportunity to call and confront witnesses, introduce documentary and all other forms of non-testimonial evidence, and present arguments in support of their respective positions. At the conclusion of the hearing the parties summarized their cases orally in lieu of filing post-hearing briefs, and the record closed. There being no issues of arbitrability, this matter is now ready for adjudication on its merits.

[1] Exhibits admitted at the hearing and referenced herein are designated ("JX____") for Joint Exhibits, ("CX____") for City Exhibits, and, ("FOPX_____) for FOP Exhibits.

Background:

The City provides public safety through its Police Department where it employs a collective bargaining unit of more than 6,000 officers and their superiors up to the rank of Deputy Commissioner. That unit is represented by the FOP, and terms and conditions of employment for the unit are memorialized in the Agreement. The parties have stipulated that, among other provisions, the Agreement requires the existence of "just cause" for discipline and discharge and further provides that whether or not just cause exists can be contested through the Agreement's grievance procedure. Like other grievances, those challenging just cause can ultimately be submitted to final and binding arbitration.

Sometime after April 5, 2012, the FOP made recourse to the grievance procedure when it challenged just cause for the imposition of a seventeen-day unpaid suspension and involuntary transfer of the Grievant herein, Patrol Officer Robert McCollum.[2] (JX 3). Officer McCollum had been hired by the Department on September 10, 1990, and as of December 29, 2011, he was working in what is known as the Evidence Custodian Unit ("the ECU" or "the Unit"), located in Philadelphia's City Hall. The ECU is part of a larger Court Evidence Unit which maintains evidence prior to trial for use in prosecutions.

One of the ECU's functions is to collect whatever money has been seized by police as evidence during the previous day. That money is initially kept at the headquarters of the District where it is seized and gets picked up by two ECU officers the following morning in what is known as the "money run." The two officers then bring the money to the ECU.

As of December 2011, ECU the two officers assigned to the money run were reporting for work at 7:00 a.m. each day. Before leaving for the run, one officer called each District to see if money was there waiting to be collected. The same officer also got keys to the District safes, secured the container in which the money is transported, and got the keys to the Unit's car. Typically, the two officers doing the money run left the ECU sometime prior to 7:30 a.m.

[2] The FOP is not seeking to overturn the transfer, as Officer McCollum does not wish to return to his prior post.

On December 29, 2011 Officer McCollum was one of the two officers assigned to the run under the supervision of Corporal P[redacted] M[redacted]. According to Officer McCollum's Notice of Suspension (JX 3), at around 7:30 that morning Cpl. M[redacted] found Officer McCollum in a cubicle area of the ECU and asked him if he were ready to go on the run. Cpl. M[redacted] testified at hearing that the other officer assigned to the run that morning had already done all the necessary preparations and was waiting to leave. As Cpl. M[redacted] remembered it, Officer McCollum replied in an antagonistic manner, loudly telling her not to rush him, that he had to finish his breakfast, and accused him of harassing him. At some point, Captain W[redacted], the commanding officer of the ECU came out of his office and told Officer McCollum to stop. About a week later Cpl. M[redacted] sought disciplinary action against him for his alleged behavior toward her. (CX 4).

At hearing City witnesses testified that the ECU had a policy that required members to be ready to work at the start of their scheduled shifts. That policy had been written when the Unit had an 8:00 a.m. to 4:00 p.m. shift, which had been abolished some time prior to December 2011 and accordingly recited the reporting time as 8:00 a.m. (UX 1). On the same date as Officer McCollum's incident—but after the incident had happened—the Unit promulgated a revised version of the policy, moving the relevant times to one hour earlier but otherwise repeating *verbatim* the language of the earlier policy. (FOPX 1).

On April 5, 2012, based on his alleged behavior of December 29, 2011, Office McCollum was given a seventeen-day suspension for violating Sections 4-03-10 and 5-011-10 of the Department's Disciplinary Code and transferred involuntarily out of the ECU to the 5th District. (JX 3).

Section 4-03-10 falls within the Code's Insubordination sections and proscribes "[p]rofane, insulting, or improper language, conduct, or gestures toward, in the direction of, or in relation to, a superior officer." (JX 2).

Section 5-011-10 is found in the Code's Neglect of Duty sections and prohibits "[f]ailure to comply with any Police Commissioner's Orders, directives, memorandums, or regulations; or any oral or written orders of superiors." (JX2).

When the FOP's grievance could not be mutually adjusted, the FOP made a demand for this arbitration.

Issue to be Determined:

At hearing the parties stipulated that the issue to be determined in this case is the following:

Did the City have just cause to suspend the Grievant, Officer Robert McCollum for seventeen days and involuntarily transfer him; if not, what shall the remedy be?

Contentions of the City:

The City produced a number of witnesses who testified about both practices at the ECU and the events of December 29, 2011.

C[redacted] W[redacted], a police officer for 19 years and a member of the EC U since May 2009 testified that officers making the money run were expected to be ready to leave the Unit by 7:15 a.m. "at the latest." This was consistent, she said, with a memorandum issued by Lieutenant J[redacted] M. H[redacted] on June 7, 2010 which set an 8:15 departure time for the shift which did the money run at that time. As explained above, that shift had started at 8:00 a.m.

Officer W[redacted] testified that on December 29, 2011 she was assigned to do the money run with Officer McCollum. Officer W[redacted] recalled seeing Officer McCollum around 6:55 a.m. that morning when she passed by his cubicle. She further testified that when Cpl. M[redacted] checked his whereabouts sometime around 7:30 a.m., Officer W[redacted] heard him respond: "This is personal! I have a right to eat breakfast." She said that when Officer

McCollum next saw her he asked if she had sent Cpl. M[redacted] to check on him. Officer W[redacted] said she had gone to get the keys for the car and the district safes prior to 7:15 and while she was doing that Officer McCollum should have been manning the front desk of the Unit in case evidence was dropped off.

On cross-examination Officer W[redacted] said she did not hear the entire conversation between Cpl. M[redacted] and Officer McCollum. She said she went to the room where the ECU keeps the guns it holds as evidence so she would not hear whatever else exchanged between the two. She further said the Officer McCollum is normally soft-spoken but that on December 29 he "got loud" with Corporal M[redacted].

Another member of the Unit, Officer M[redacted] F[redacted], said that around 7:30 a.m. on December 29, 2011 she overheard part of the conversation between Cpl M[redacted] and Officer McCollum. As she recollected it, Cpl M[redacted] asked Officer McCollum if he were ready to go on the run and he loudly replied he was not because he was eating his breakfast. Officer F[redacted] said she then left her desk and could not recall anything else that transpired between the Corporal and Officer McCollum. Consistent with a statement she gave about the matter (CX 3), Officer F[redacted] said she did not hear Officer M[redacted] raise her voice to Officer McCollum. Like Officer W[redacted], she stated that Officer McCollum is normally soft-spoken.

The City's chief witness, Cpl. M[redacted], testified that she had been in the ECU since 2004 and had supervised Officer McCollum regularly from 2005 until November 2008, and was supervising him on December 29, 2011. The Corporal confirmed that Officers W[redacted] and McCollum were assigned to the money run that day and that by 7:30 a.m. Office W[redacted] had gotten the safe keys, car keys, and other material necessary for the trip. At that time, Cpl. M[redacted] said, she asked Officer W[redacted] where Officer McCollum was, and Officer W[redacted] pointed to the back of the Unit's work area. Cpl. M[redacted] said she went to look for Officer McCollum, found him, and asked when he would be ready to leave.

According to her account, Officer McCollum became very loud, which the Corporal said it was out of character for him. She said that when she told him to lower his voice he accused

her of violating his right to eat breakfast. Cpl. M[redacted] testified that had Officer McCollum simply told her he needed just another few minutes, she would have walked away. His response however, prompted her to seek discipline. Accordingly, she wrote a Request for Disciplinary Action memorandum addressed to the Commanding Officer of the Police Board of Inquiry, Charging Unit which was approved for transmittal by Captain W[redacted] of the larger Court Evidence Unit under which the ECU operates. (CX 4).

Cpl. M[redacted] conceded that the commanding officer of the ECU itself, Lieutenant J[redacted] H[redacted], explained that there were other responses to Officer McCollum's alleged behavior, but said that she elected to invoke formal discipline anyway.

Cpl. M[redacted] also testified that Office McCollum never expressed ignorance about the time the money run was to begin, and she further stated that she never got any prior report that he was not performing the run in a timely manner. Cpl. M[redacted] also denied having any problem with officers eating breakfast on the job but insisted they were to perform their duties on time.

Under cross-examination Cpl. M[redacted] stated she was aware that Officer McCollum had filed an employment discrimination charge against her. That charge resulted in a "no cause" finding.

Captain B[redacted] W[redacted], the commanding officer of the Court Evidence Unit, of which the ECU is a part, testified that after he had seen Cpl. M[redacted]'s Request for Disciplinary Action memorandum, he spoke to Officer McCollum about his conduct.

Lt. H[redacted] testified that he was aware of the December 29, 2011 incident and tried to dissuade Cpl. M[redacted] from filing formal disciplinary charges, suggesting that instead she issue a reprimand and engage in oral counseling. Lt. H[redacted] also explained that he had issued the June 2010 memorandum regarding when the money run was to start. He explained that the 8:00 a.m. -4:00 p.m. shift had been replaced by the end of 2011 by the 7:00 a.m. -3:00 p.m. shift. (CX 1). Lt. H[redacted] said the 2010 memorandum was published because of an incident that year when the Lieutenant had seen Officer McCollum out of uniform around 8:30 one

morning. At the time Officer McCollum was on the 8:00 a.m. – 4:00 p.m. shift. The Lieutenant said that when Officer McCollum told him he was getting dressed, he reminded him that he was to be ready to work by 8:00 a.m. and should be ready to do the money run by 8:15. Lt. H said that although everyone else in the ECU signed acknowledgement of receipt of the memorandum, Officer McCollum refused.

Lieutenant H also testified about a dispute in the Unit between Sergeant B R ("Sgt. F") and a civilian female employee of the Unit named A M. He related that in May 2011, Sgt. F sent him a "Request for Disciplinary Actions" memorandum regarding two incidents she said she had had with Ms. M (UX 2) and that he had interviewed Ms. M in the presence of Captain W. The Lieutenant said that because two months earlier Sgt. F had rated Ms. M as "satisfactory," and Ms. M was quite young, and Ms. M had claimed Sgt. F had been "riding" her, he and Captain W decided not to issue formal discipline, even though Ms. M was subject to the Department's Disciplinary Code. He further conceded that Ms. M admitted to some of the charges raised against her by Sgt. F but denied others. He said that ultimately no discipline was imposed on Ms. M and that did he did not report back to Sgt. F.

The Lieutenant described Sgt. F as a "trouble-maker" whom he had caught in lies and with whom his working relationship has not been good. Lt. H testified that he, too, had been named as a respondent in the discrimination charge filed by Officer McCollum.[3]

The City relies on the above averments and argues that the discipline imposed was appropriate for Officer McCollum's behavior. The City emphasizes the number of witnesses who reported he spoke loudly to Cpl. M and was antagonistic toward her, as well the number of witnesses who testified he was not prepared to go on the run until after the expected 7:15 departure time. The City also emphasizes that there is no proof the discipline was motivated by retaliation for the discrimination charge he had filed a year earlier. On the contrary, the City stresses that the discipline followed the 2010 memorandum from Lt. H

[3] The complaint was filed after the issuance of the June 2010 memorandum, according to Lt. H testimony.

about the run beginning 15 minutes after the start of the shift and the need for all officers to be ready to work when the shift commenced. That memorandum, the City points out, was generated after Lt. H had the same issue in 2010 with Officer McCollum as arose December 29, 2011. Accordingly, the City urges, Officer McCollum had been advised of his responsibilities, yet deliberately refused to comply with them and was not ready to assume the money run at the time prescribed by his superiors.

The City also rejects any notion that there was disparate treatment in this case. The City argues that Lt. H gave a credible explanation for why Ms. M was not disciplined after getting into an altercation with Sgt. F. Additionally, the City maintains, Sgt. F testimony about the M incident was not credible.

Contentions of the FOP:

The FOP presented its factual case through the testimony of Officer McCollum and Sgt. F.

The latter testified that she had been in ECU almost eight years and was one of two sergeants in the Unit. She explained that she had given Ms. M an oral warning in or around the month of April 2011 and that the next time she spoke to her Ms. M cursed at her In front of others. Sgt. F said she prepared her memorandum requesting disciplinary action against Ms. M and gave it to Lt. H and Captain W. (UX 2). However, she said, Ms. M received no discipline. This was surprising to her, she said, given her testimony that Ms. M at one point said, "You're not my f--king supervisor."[4]

In cross-examination, Sgt. F denied disliking Cpl. M, and called in rebuttal, she testified that when she asked Cpl. M why she did not take a more lenient approach toward Officer McCollum, the latter said Lt. H told her she could not allow the Officer to speak to her as he had.

[4] That specific accusation does not appear on Sgt. F report of the matter. (UX 2).

Officer McCollum testified that he had been in the ECU since May 2005 and had first done the money run in 2009. In 2008, he said, he filed an employment discrimination complaint that named M[redacted] as a respondent.

He related that he arrived at work around 6:50 a.m. on December 29, 2011 and immediately went to his locker to change into his police uniform. At the time, he said, Officer W[redacted] was at the counter. Officer McCollum said he knew he had to do the money run that day and that he and Officer W[redacted] did the run Monday through Wednesday. After Officer Friend arrived at 7:10 a.m. she relieved Officer W[redacted] at the counter and by 7:15 a.m. the latter had gone to get the keys and other material necessary to accompany him on the run.

In the meantime, he recounted, he was eating a bagel. He said it was earlier than 7:30 when Corporal M[redacted] approached his location yelling that Officer W[redacted] was ready to leave. Officer McCollum asked her why she was yelling and told her he was entitled to eat. He also testified that he told her he thought she was retaliating against him. Around that time, he said, Captain W[redacted] told them both to stop arguing, and he went on the run with W[redacted].

Officer McCollum said he raised his voice only after Cpl. M[redacted] had raise hers, but he denied using any bad language, insults or challenges to the Corporal's authority. He also denied having any responsibility for staffing the counter and said that that was Officer Friend's duty. In his view, officers who do the money run do not work at the counter until after the run is completed.

The Officer further claimed that other police in the ECU did not like him because Lt. H[redacted] told them he had filed a discrimination complaint. He further alleged that he had been assigned to the money run to punish him. He explained his refusal to acknowledge receipt of the June 2010 memorandum regarding readiness because he believed it was aimed at him personally.

The FOP believes the above does not justify a seventeen-day suspension for three reasons. First, the FOP says that even assuming Officer McCollum raised his normally soft voice,

the unusualness of that occurrence only calls into question the degree to which he was provoked by Cpl. M[redacted]. The FOP contends that it was the usual practice in the ECU for officers to eat breakfast after they reported and—within reason—to leave for the money run when they were ready rather than at a strict time. The FOP considers Cpl. M[redacted] approach to Officer McCollum to have been an unnecessary goad, one that led Officer McCollum to genuinely believe he was being singled out and retaliated against for his earlier filing against her and Lt. H[redacted].

Second, no matter what level or why the volume of Officer McCollum's response, the FOP underscores the absence of any evidence that he used bad language, insults, or threats against Cpl. M[redacted].

Third, even if some discipline were justified, the FOP complains the degree levied on Officer McCollum was disparate, given evidence of Ms. M[redacted] vitriolic speech to Sgt. F[redacted] for which Ms. M[redacted] received no discipline whatsoever. Instead, her offense was practically swept under the rug, according to the FOP. If the use of profanity against a supervisor merits no disciplinary response, the FOP questions, why was Officer McCollum given such a harsh penalty for merely questioning the good faith of Cpl. M[redacted] complaint against him.

Opinion:

There have been many descriptions of the requirements for "just cause" in disciplinary cases before labor arbitrators. All of them include affirmative answers to the following questions:

(1) Was there a rule in place at the time of the employee's alleged act?

(2) Did the accused have knowledge, either actual or constructive, of that rule?

(3) Is there a rational relationship between the rule and the employer's legitimate endeavors?

(4) Was application of the rule against the employee rational, or, stated differently, is

there any reason, including excuse or justification, why the rule should not be applied?

(5) Has the employer proven—where necessary by a full and fair investigation—an unreasonable violation of the rule?

Where the answers to all the above are in the affirmative, the "just cause" inquiry turns to the nature of the penalty imposed unless the penalty has been set by a negotiated agreement between the employer and the employee's union. Where there is no such agreement, an arbitrator looks to the nature of the offense, the harm or potential harm caused to the employer, the employee's length and merit of service, and penalties administered to other similarly situated employees who were guilty of the same or a similar violation.

In this matter, the City has established that in Sections 4-003-10 and 5-011-10 of the Disciplinary Code it had rules upon which it relied in disciplining Officer McCollum; that those rules exited prior to his alleged conduct; that the rules were published in the Department's Disciplinary Code; and that the rules are important to the legitimate interests of the City and Department. Moreover, I am convinced that if the alleged conduct occurred, it fell within the compass of at least Section 5-011-10, if not Section 4-003-10. Given the lack of evidence to support Officer McCollum's claim that Cpl. M[redacted] inquiry on December 29 2011 was motivated by animus, I can find no excuse or justification that would exculpate Officer McCollum's conduct.

The foregoing leaves only one remaining issue as to whether the City had just cause for some discipline against Officer McCollum: Did he McCollum act the way the City says he did when Cpl. M[redacted] inquired as to his readiness for duty on December 29, 2011?

The City's evidence in this regard is overwhelming. Cpl. M[redacted] credibly testified that, as the supervisor responsible for Officer McCollum's work that day, she asked him if or when he would be ready to make the money run. No one who heard any part of their conversation testified that she was rude or abusive to the Officer, and only Officer McCollum charged that she was loud when she made the inquiry. Both Officer W[redacted] and Officer F[redacted] testified that for his part Officer McCollum was loud during the conversation.

More importantly, all witnesses—including Officer McCollum—agree he was not ready to make the run around 7:30 a.m. Notwithstanding that Lt. H[redacted] memorandum of June 2010 spoke of an 8:15 a.m. start time for the money run, I am convinced that everyone involved, including Officer McCollum, knew that the mandated time had become 7:15 once the ECU's 8:00 a.m. -4:00 p.m. shift had been abolished. Officer W[redacted] and Corporal M[redacted] clearly knew it, and even Officer McCollum never claimed the run was to start later. Further, Lt. H[redacted] testified credibly and without contradiction that he had counseled Officer McCollum in 2010 about the need to be ready to work at the start of his shift. He stated that the incident that spurred the 2010 counseling and memorandum involved Officer McCollum not even being in uniform a half hour after his shift had begun. The fact that a year and one-half later Officer McCollum was not in compliance with those directions gives the City all the more just cause to impose discipline.

However, I find that that discipline must be based on a violation of Section 5-011-10 of the Disciplinary Code and not Section 4-003-10. As recited above, Section 5-011-10 prohibits a "[f]ailure to comply with...any oral or written orders of superiors." That is exactly what Officer McCollum did in this matter with his unjustified sense of entitlement to duty-free paid time when he ate breakfast. To the contrary, I do not find him guilty of violating Section 4-003-10, relating to "[p]rofane, insulting, or improper language, conduct, or gestures toward, in the direction of, or in relations to, a superior officer."[5] Although he may have raised his voice and accused Cpl. M[redacted] of being personally hostile to him as he asserted an unfounded right to eat breakfast while refraining from duty , I believe such conduct falls short of the intended scope of Section 4-003-10.

Having found just cause for some discipline based on the Section 5-011-10 violation, I turn to the issue of whether the quantum levied on Officer McCollum was appropriate. Because

[5] Because the FOP's evidence and arguments regarding the Marcellino-Cpl. Marrero incident form a defense to any penalty imposed for a Section 4-003-10 violation, and I have found Officer McCollum not guilty of violating that section, I make no determinations regarding Marcellino's alleged conduct or the effect of the Department's response to it.

I do not find him guilty of any Section 4-003-10 violation, any portion of the penalty based on that allegation cannot be sustained.

The Notice of Suspension does not indicate how much of the seventeen day-suspension was attributable to each of the two Sections involved or whether the involuntary transfer was attributable to one or both of them. Looking only to the Section 5-011-10 violation, I note that the Disciplinary Code recommends a reprimand to a five days suspension for a first offense and a 5-10 day suspension for a second offense. Because I find that the counseling Officer McCollum received in 2010 was a "reprimand" for purposes of the Section and that the reprimand occurred within the two-year reckoning period the Department has adopted by such an offense, Officer McCollum's violation on December 29, 2011 was a second offense. Given that fact and the adamancy with which he insisted on his right to eat on a duty-free basis and lack of contrition, I find a seven day penalty is appropriate. As for the involuntary transfer, that action should be rescinded on the Officer's record and changed to a voluntary transfer, whether or not it was attributable to the Section 5-001-10 violation.

An Award will be entered accordingly.

Award:

The FOP's grievance is denied in part and sustained in part.

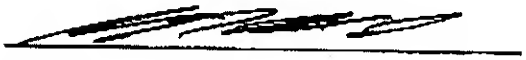
The grievance is denied to the extent the City had just cause to impose a penalty on the Grievant, Officer Robert McCollum, for violating Section 5-011-10 of the Department's Disciplinary Code.

The grievance is sustained to the extent the City did not have just cause to impose any penalty on the Grievant, Robert McCollum, for violating Section 4-003-10 of the Department's Disciplinary Code.

The grievance is further sustained to the extent that the City had insufficient just cause to impose a seventeen-day suspension and involuntary transfer on Officer McCollum. The said suspension shall be mitigated to a seven-day day penalty and the involuntary transfer shall be changed to a voluntary transfer.

4/6/13

Date



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